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Nos. 128, 129

In the Supreme Court of the United States

OCTOBER TERM, 1941

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, A CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

MARLBOROUGH HOUSE, INC., A CORPORATION PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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The Government does not oppose the granting of writs of certiorari in these cases.

The question is the basis for depreciation, under Sections 23 (k), 113 and 114 (a) of the Revenue Act of 1932, of corporate assets bought in at equity foreclosure sale by a bondholders' committee, and thereafter transferred to a new corporation in return for a distribution to depositing bondholders of all of the new corporation's common stock. It is agreed that by virtue of Sections 113 (a) (8) and 112 (b) (5) of the Act the basis of the property will be the same in the hands both of the committee (No. 128) and of the new corporation (No. 129).

The court below sustained the Commissioner's determination that the basis was the price paid for the assets at the foreclosure sale. It upheld the position that the assets were not acquired in connection with a "reorganization" within the definitions of Section 112 (i) (1) of the Act, and that therefore the basis of the property in the hands of the old corporation would not carry over under either Section 113 (a) (6) or (a) (7).

This conclusion rests on the view that a transaction which transfers the ownership of an enterprise from its stockholders to its creditors does not provide the continuity of proprietary interest essential to a "reorganization" under the revenue laws. The Commissioner has taken this position in the light of this Court's decisions in *LeTulle* v. *Scofield*, 308 U. S. 415, and *Helvering* v. *Tyng*, 308 U. S. 527.

The Commissioner's determination has been challenged successfully in a number of similar cases before the Board of Tax Appeals. In each instance the Government has filed petitions for review with the Circuit Court of Appeals. The Circuit Court of Appeals for the Ninth Circuit has sustained the Commissioner both in the instant case and in *Commissioner* v. *Palm Springs Holding Corp.*, decided May 14, 1941, not yet officially reported but found in 1941 C. C. H., Vol. 4, par. 9470. A contrary result, however, has been reached by the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *Southwest Consolidated Corp.*, decided April 19, 1941, not yet reported but found in 1941 C. C. H., Vol. 4, par. 9402, and in *Commissioner* v. *Alabama Asphaltic Limestone Co.*, decided May 5, 1941, not yet reported but found in 1941 C. C. H., Vol. 4, par. 9452. The Government intends to file petitions for writs of certiorari in these cases. The question is also pending before the Circuit Courts of Appeals for the Second Circuit (*Commissioner* v. *Meyer Buchman; Commissioner* v. *New Haven & Shore Line Ry. Co.*), for the Eighth Circuit (*Commissioner* v. *New President Corp.*), and for the Tenth Circuit (*Commissioner* v. *James Q. Newton Trust* and *Commissioner* v. *James Q. Newton, Jr.; Commissioner* v. *Cement Investors, Inc.*).

Accordingly, although we believe the instant case was correctly decided by the court below, we

do not oppose the granting of the writs in view of the conflict between the circuits and the manifest importance of the question in the administration of the revenue laws.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

JULY 1941.

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